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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,

Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,

Defendant-Appellee.

APPELLANT'S BRIEF ON JURISDICTION.

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MELVIN L. LEVITT,
On the Brief.

THE COURT PRESS, N. Y. C.

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Defendant-Appellee.

APPELLANT'S BRIEF ON JURISDICTION.

Statement of the Case.

This case is before this Honorable Court on a direct appeal by the complainant-appellant from a decree of a specially constituted statutory Court dismissing its Bill of Complaint against the appellee, the District Attorney of New York County. By this action, the appellant seeks to enjoin the said District Attorney from the enforcement of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, under a New York State statute (Chapter 781 of the Laws of 1933) (R. 33).

Probable jurisdiction was noted on December 10th, 1934, and the case argued before this honorable Court on March 11th, 1935. During the course of the argument, this honorable Court raised the question of jurisdiction. In view of the fact that neither of the parties had briefed the

question of jurisdiction of the Statutory Court under Section 266 of the Judicial Code (United States Code, Title 28, Section 380), this honorable Court requested the submission of briefs upon the following two specific questions:

(a) Whether or not equitable jurisdiction existed for the Statutory Court to entertain the suit; and

(b) Whether or not the District Attorney appellee is a state officer within the meaning and purview of Section 266 of the Judicial Code.

The argument was thereupon continued indefinitely subject to the receipt by this honorable Court of the respective briefs of the parties.

The proceedings in the Court below are sufficiently set forth in the main briefs of the appellant and appellee, as well as in the supplemental briefs of the appellee and the Attorney General, and by reason thereof, require no repetition.

POINT I.

Equity jurisdiction of the cause of action alleged in the Bill of Complaint was properly invoked by the appellant, and the statutory court sitting as a court of equity properly entertained the suit.

By this action, appellant seeks to restrain the appellee, the District Attorney of New York County, State of New York, from criminally prosecuting the appellant under an unconstitutional state statute alleged by the appellant to be in contravention of the Fourteenth Amendment to the Federal Constitution as well as violative of the New York State Constitution, the appellee having openly and publicly

proclaimed such threats to criminally prosecute the appellant and such prosecutions, while not actually pending, were imminent (R. 11, 12; R. Supp. 15, 16).

It is the well settled rule that equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential to avoid multiplicity of suits and criminal prosecutions and also in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable. In such a case a person, who as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings either civil or criminal to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity. *Terrace* v. *Thompson*, 263 U. S. 197; *Truax* v. *Raich*, 239 U. S. 33; *Tyson* v. *Banton*, 273 U. S. 418; *Packard* v. *Banton*, 264 U. S. 140; *Ex Parte Young*, 209 U. S. 123; *Adams* v. *Tanner*, 244 U. S. 590; *Cline* v. *Frink Dairy*, 274 U. S. 445; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497.

Analysis of Cited Cases.

In *Tyson* v. *Banton*, *supra*, this Court sustained the jurisdiction of the lower statutory court and granted an injunction restraining the District Attorney of New York County and the Attorney General of the State of New York, from enforcing, as against the appellant Tyson, the provisions of a New York State statute which fixed the maximum resale prices of theatre tickets. The Bill of Complaint in the cited case alleged that the terms of the statute were so drastic and the penalties for its violation so great, (imprisonment for one year or a fine of $250 or both) that the appellant could not resell any ticket or evidence of

the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the state law. The appellant further alleged that it would be compelled to submit to the statute whether valid or invalid, unless the suit be entertained, in which event, it would be deprived of its liberty and property without due process of law, and be denied the equal protection of the law in contravention of the Fourteenth Amendment to the Federal Constitution.

Under the statute involved in this latter case, the resale of every ticket constituted a separate crime with recurring penalties of fine and imprisonment. In order to prevent the multiplicity of suits and criminal prosecutions, and to safeguard the personal and property rights of the appellant, the deprivation of which was threatened under this unconstitutional state statute, equity jurisdiction was invoked and sustained by this Court which stated:

> "Following the rule frequently announced by this Court that 'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments when the prevention of such prosecution is essential to the safeguarding of rights of property' we sustain the jurisdiction of the District Court."

In *Hygrade Provision Co.* v. *Sherman* (*supra*) a New York State statute prohibited the offering for sale or sale of meat products without specific designation as to whether or not the meat was "kosher" or "non-kosher", the statute making it a misdemeanor for any violation of the said State statute. The appellant Hygrade Provision Co. had never been prosecuted for a violation of the statute attacked as unconstitutional nor had it ever been specifically threatened with such prosecution. The Bill of Complaint in that case merely alleged a general threat that all vio-

lators of the statute would be prosecuted and concluded with the allegation that in the event of such prosecution, irreparable injury to its business, property, good will and reputation would result.

This Court sustained the equitable jurisdiction invoked under the exception to the general rule hereinabove quoted, namely, that a court of equity will interfere to prevent criminal prosecutions under an unconstitutional statute when that is necessary to effectually protect property rights. In this latter case, the Bill disclosed a doubtful jurisdictional question, "but upon a liberal view of the decisions of this Court (see *Kennington* v. *Palmer*, 255 U. S. 100; 65 L. Ed. 528; 41 Sup. Ct. Rep. 303, and cases referred to in footnote)" this Court concluded that on the decisions heretofore rendered, equitable jurisdiction was properly invoked if the statute under review was in fact unconstitutional.

In *Packard* v. *Banton, supra,* the appellant sought to enjoin the enforcement of a New York State statute which made it a misdemeanor to operate a motor vehicle for hire without having furnished a personal or surety bond in the sum of $2,500 to secure the payment of any judgment recovered against any owner of such hired motor vehicle by reason of death or injury caused in the operation of such motor vehicle.

The appellant averred that the appellees, the District Attorney of New York County, and the Attorney General, threatened to prosecute the appellant for his failure to comply with the said provisions of the New York State statute, and that they would proceed to prosecute him unless he complied with the said law.

While the case presented no more than the possibility of a *single* prosecution for the failure to comply with the terms of the State statute, and while the appellees urged upon

this Court that the appellant had an adequate remedy at law, this Court again invoked the exception to the general rule, sustained equitable jurisdiction and proceeded to the determination of the validity of the state statute upon the merits.

In *Terrace* v. *Thompson, supra,* this Court had occasion to review the many decisions dealing with equitable jurisdiction to restrain threatened criminal prosecutions. The complainant in this case sought to restrain the District Attorney of the State of Washington from enforcing a State statute forbidding aliens to own and hold real estate. The complainant sought to lease certain lands to an alien, but was threatened by the Attorney General with criminal prosecution in the event that such lease was consummated.

In opposing the jurisdiction of equity to entertain the suit, the Attorney General argued that an adequate remedy at law existed. His contentions were based upon two propositions, (1) that

> "The validity of the law might be determined in proceedings to declare a forfeiture of the property to the state"

or (2)

> "in criminal proceedings to punish the owners."

This Court overruled both contentions and entertained jurisdiction of the suit on the ground that the complainant's remedy was in equity for the legal remedy was not

> "as complete, practical and efficient as that which equity could afford."

In part, the Court said:

> "If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the

owners of their right to lease their land to Kukstsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as complete, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that, after the making of the lease, the validity of the law might be determined in proceedings to declare a forfeiture to the property to the State, or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of the law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment, and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join in violating the terms of the enactment and take the risk of forfeiture * * *. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevents each from dealing with the other. *Truax* v. *Raich*, 239 U. S. 33. *They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complainant presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution.*" (Italics ours.)

In *Truax* v. *Raich* (*supra*), the complainant sought to restrain the Attorney General of the State of Arizona from

prosecuting the complainant unless he complied with the State law providing for the employment of at least 80% native-born citizens of the United States or qualified electors. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder. After the bill was filed, an injunction pendente lite was sought. After notice of this application, the complainant *was arrested* for violation of the act upon a complaint prepared by one of the assistants in the office of the County Attorney, and it appeared that by reason of the determination of the officers to enforce the act, there was danger of the complainant's immediate discharge from employment. The District Judge accordingly granted a temporary restraining order.

The defendants sought to dismiss the appeal upon the grounds (1) that the suit was against the State of Arizona without its consent; (2) that it was to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties and that the complainant was not entitled to sue for the relief asked.

The application for an interlocutory injunction and the motion to dismiss was then heard before three judges as required by Section 266 of the Judicial Code. The motion to dismiss was denied, and an interlocutory injunction restraining the Attorney General, County Attorney and the enforcing officers from enforcing the act against the complainant, granted.

Equitable jurisdiction was upheld by this Court, the opinion reading in part as follows:

> "As the appeal is framed upon the theory that the act is unconstitutional and that the defendants,

> who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the State. Whatever doubt existed in this class of cases was removed by the decision in *Ex Parte Young*, 209 U. S. 123, 159, 161, 52 L. Ed. 714, 727, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cases 764, which has repeatedly been followed."

citing cases. And further:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*re Sawyer* 124 U. S. 200, 210) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights and property."

citing cases. And still further:

> "It is also entirely clear that unless enforcement of the act is restrained, the complainants will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

Perhaps the leading case on the subject is *Ex Parte Young* (*supra*), where a great number of the authorities were collated, distinguished and reviewed. This decision exerted an enormous influence in the furtherance of the exercise of the jurisdiction of federal courts to grant equitable relief against unconstitutional penalties and

prosecutions threatened under state authority. This Court has since without variation, announced and applied it in numerous cases. (*Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278 (1913); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Cuyahoga* v. *Akron*, 240 U. S. 462 (1916); *Greene* v. *Louisville Ry.*, 244 U. S. 499 (1917); *Cavanaugh* v. *Looney*, 248 U. S. 453 (1919); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426 (1926); *Binford* v. *McLeaish & Co.*, 284 U. S. 598 (1932); *Sproles* v. *Binford*, 286 U. S. 374 (1932); *Mosher* v. *Phoenix*, 287 U. S. 29 (1932); *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

In *Adams* v. *Tanner* (*supra*), the State statute prohibited employment agencies from accepting fees for securing positions for applicants of employment. The penalty involved for violation of such statute was a fine not to exceed $100 and imprisonment not to exceed thirty days for *each* violation. Equity jurisdiction was invoked and sustained to prevent a multiplicity of prosecutions by reason of possible recurring penalties for each violation of the Act and to safeguard the rights of the complainant to continue in its lawful business as an employment agency.

The appellant respectfully submits that the facts in the case at bar fall clearly and unequivocally within the decisions of this Court cited above and respectfully contends that an analysis of the facts herein, demonstrates the correctness of the statutory Court's entertainment of equitable jurisdiction.

The Facts in the Case at Bar.

The appellant, a New York corporation, has been engaged in the business and trade of buying and selling motor vehicles, motor vehicle parts and accessories, and

the general service and repair of motor vehicles, and except for the manufacture of automobiles and parts, is engaged generally in the motor vehicle business (R. 4). At the time of the commencement of this action, it had been engaged in such business for upwards of eleven years having been incorporated in the year 1923. Together with its affiliate, Spielman-Chevrolet Corporation, it conducts its business at five branches in the Boroughs of Manhattan and Brooklyn, City and State of New York (R. 4), and in such conduct and management of its business, it employs eighty employees. In the establishment of the appellant's business, it has expended vast and considerable sums of money, time and effort and has developed a good will amongst its customers and patrons of immeasurable value (R. 5).

Prior to the adoption of the Code of Fair Competition for the Motor Vehicle Retailing Trade promulgated under the National Industrial Recovery Act and having its apparent sanction as law of the State of New York by virtue of Chapter 781 of the Laws of 1933 of the State of New York, the appellant transacted its business within the dictates of its discretion, based upon sound, economic business sense. In its sales of new automobiles, trade-ins constituted 85% of its sales. The Bill alleges (R. 11) that prior to the adoption of the provisions of Article IV of the Motor Vehicle Retailing Code, by allowing its customers and patrons actual, fair and honest values for used car trade-ins, on the purchase of new cars, irrespective of the maximum allowances now fixed under the Code provisions referred to, the complainant made a fair return and profit on its investment.

The Bill further alleges that while the appellant was thus engaged in its lawful and legal private business, the defendant, as District Attorney of New York County, made an application to a Magistrate of the City of New York in the name of the People of the State of New York,

for the issuance by such Magistrate of a Summons directing and requiring the complainant to appear before said Magistrate to the end that an investigation be made of an alleged complaint against the complainant for alleged and purported violation of the provisions of Article IV of the Motor Vehicle Retailing Code, and that upon such investigation, an information be drawn against the appellant for alleged violation of the provisions of the Motor Vehicle Retailing Code, referred to.

This threat to criminally prosecute the appellant was based upon the provisions of Chapter 781 of the Laws of 1933 of the State of New York, which provides that any violation of any of the provisions of any Code of Fair Competition filed with the Secretary of State of New York pursuant to the said Chapter, is a misdemeanor punishable by $500. fine for each day of violation, each day constituting a separate offense.

In the face of appellee's threats to criminally prosecute the appellant, it filed its Bill of Complaint in the District Court, Southern District of New York, challenging the constitutionality of the action of the appellee and the constitutionality of the State statute under the Federal Constitution, to wit, the Fourteenth Amendment thereof.

The bill asserts that the terms of the Statute are so drastic and the penalty for violation so severe, that in the event that the appellant refuses to comply with said Statute and in the event of conviction for such purported violations, it will be subject to the heavy penalties prescribed by Chapter 781 of the Laws of 1933, which said penalties, if appellant were compelled to pay, would be a deprivation of its rights, liberty, property and immunities without due process of law (R. 13).

In the event that the appellant abides by the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, then and in that event, it is

compelled, by its apparent sanction as law, pursuant to the provisions of Chapter 781 of the Laws of 1933, to charge arbitrary and unreasonable prices on trade-ins, by reason thereof, appellant could not continue in its lawful business, in which alternative event it will likewise be deprived of its rights, property, privileges and immunities without due process of law (R. 13).

In this connection, it may be well to point out that not only does Chapter 781 of the Laws of 1933 make it a misdemeanor for one to violate the provisions of any Code with the consequent penalty of a maximum $500 fine, but by the provisions of Sections 484 and 718 of the Code of Criminal Procedure of the State of New York, a defendant may also be directed to be imprisoned until such fine is satisfied, the imprisonment being stated not to exceed one day for every dollar of the fine.*

By virtue of the threats of the appellee to criminally prosecute the appellant for alleged violations of the statute, appellant was faced not only with the possibility of being fined out of business or its business destroyed by the

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* "Sec. 484. Judgment to Pay Fine.

The power to remit a fine imposed by any court, whether of record or not of record, imposed for any criminal offense whatever, shall only be exercised as in this section provided. Any court of record, except an inferior court of local jurisdiction, which has imposed a fine for any criminal offense, or the presiding judge thereof, or any judge authorized to preside therein, shall have power in his discretion, on five days' notice to the district attorney of the county in which such fine was imposed, to remit such fine, or any portion thereof. In case of a fine imposed by a court not of record or by any inferior court of local jurisdiction for any criminal offense whatever, the county judge of the county in which the fine was imposed, and in case of a fine imposed by such a court in the city of New York, the court of general sessions, or any judge thereof, upon five days notice to the district attorney of the county in which such fine was imposed, shall have the same power. A judgment that the defendant pay a fine may also direct that he be imprisoned, which cannot exceed one day for every one dollar of the fine. (Amended by L. 1886, ch. 434.)"

"Sec. 718. Judgment of Imprisonment until Fine be Paid; Extent of Imprisonment; Probation; Restitution.

A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied; specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine. The court may require a defendant to pay a fine or restitution, or to make reparation, as provided in subdivision two of section four hundred and eight-three. (Amended by L. 1910, ch. 600.)"

statute attacked, if unconstitutional as alleged, but it was also liable through its officers and employees to imprisonment not to exceed one day for every dollar of fine.*

The Bill of Complaint proceeds further to allege that unless an injunction be granted temporarily and permanently, the appellant would suffer irreparable damage (R. 13), and that it had no adequate remedy at law (R. 14).

The Statutory Court found as facts that the appellee openly and publicly proclaimed to the complainant that he was prepared and ready, through his office as District Attorney of the County of New York, State of New York, to institute criminal prosecutions against the complainant herein for alleged violations of the provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the violation of Article IV, Subdivision A, Paragraph 1, and Article IV, Subdivision B, Paragraph 2 (R. Supp. 15).

It found further that "it was the duty of the defendant to prosecute in an official capacity all violations of law and public offenses (R. Supp. 14), and that but for the adoption and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade, and but for the provision therein contained establishing the maximum trade-in allowance in the Official Guide Book, and but for the fact that Chapter 781 of the Laws of 1933 of the State

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* Such has been the construction of prior statutes which decreed similar punishment (*Chapman* v. *Sclover*, 225 N. Y. 417; 122 N. E. 206) and the construction of Chapter 781 of the Laws of 1933 involved in the case at bar. (*People* v. *Harris*, 153 Misc. Rep. 300; 274 N. Y. Supp. 171.)

In *Chapman* v. *Sclover* (*supra*), Mr. Justice Cardozo stated at page 421:

> "The state when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty. (Code of Civil Procedure, Section 1962.) The offender who refuses to pay (the fine) may be imprisoned until the fine is satisfied, subject to the condition that the imprisonment may not exceed one day for every dollar of the fine (citing authorities). The punishment is not solely the liability for a debt. The punishment includes the consequences that follow upon default."

of New York fixed a penalty not exceeding $500 fine for each violation of the aforesaid provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade, the complainant could continue to offer trade-in allowances in the sale of new cars, without restriction except by its own sense of discretion." (R. Supp. 16).

It found as a fact that the appellant is one of the largest motor vehicle retailers in the City of New York operating four branches in addition to its principal place of business, and employing approximately eighty employees (R. Supp. 13 and 14), and that in the establishment and conduct of its business, it had invested and expended in both physical assets and in the establishment and retention of intangible good will, vast and considerable sums of money, which has resulted in the development of patronage of great monetary value (R. Supp. 38).

Finally, it found that the appellant had no adequate remedy at law (R. Supp. 38) and could only have relief in a Court of equity.

In view of the allegations of the Bill of Complaint supported by the Findings of Fact of the Statutory Court, and in view of the similarity of the factual situation presented in the case at bar with the factual situations appearing in *Tyson* v. *Banton* (*supra*), *Adams* v. *Tanner* (*supra*), *Hygrade Provision Co.* v. *Sherman* (*supra*) and *Ex Parte Young* (*supra*), the appellant respectfully submits that within the authorities cited, equity jurisdiction was justifiably invoked and properly sustained by the lower Court.

Appellant submits further however that the facts in the case at bar present even a stronger case for equitable relief than some of the cases referred to above, particularly the cases of *Packard* v. *Banton* (*supra*) and *Hygrade Provision Co.* v. *Sherman* (*supra*).

In the *Packard* case there were no recurring penalties. The appellant was either compelled to insure his motor

vehicle or be subject to a single prosecution for the failure to comply with the statute. This Court held, nevertheless, that sufficient facts existed for equitable jurisdiction.

Similarly, in *Terrace* v. *Thompson* (*supra*) and in *Traux* v. *Raich* (*supra*), single transactions and prosecutions were involved, yet equity jurisdiction was sustained by this Court.

In the case at bar however, we find the following conditions to exist. Each acceptance by the appellant of a traded in automobile above the maximum price fixed by the provisions of the Code, constitutes a separate and distinct offense and is punishable by a maximum fine of $500 and imprisonment not to exceed one day for each dollar of fine (N. Y. Code of Criminal Procedure, Sec. 484 and Sec. 718; *Chapman* v. *Sclorer* (*supra*); *People* v. *Harris* (*supra*)). In the normal course of one day's business, the appellant might accept ten traded in automobiles on the sale of new cars and grant ten allowances on the traded in automobiles above the maximum Code Provisions. In such instance, for a single day's business, the appellant would be subject to ten prosecutions or a daily maximum fine, if convicted, of $5,000 with a maximum of 5,000 days (over 13 years) imprisonment—*this, by reason of one day's violation of the provisions of the Code.* If, in the course of one week's business, the appellant consummated sixty sales of new cars upon the trade-in plan and granted allowances on such trade-ins of more than the maximum prices established by the Code, it would be subject to 60 distinct penalties amounting to a maximum fine of $30,000 and imprisonment of its officers and employees for well nigh 70 years.

Faced with this possibility and the multiplicity of prosecutions, the appellant's recourse was only to a court of equity, and the only appropriate relief available to it to test the constitutionality of its state's statute was the remedy pursued—injunction.

The appellant, in the institution of this action, followed closely the decision of this Court in *Ex parte Young* for the facts with respect to punishment are quite parallel. In *Ex parte Young,* this Court stated:

> "For disobedience to the Freight Act, the officers, directors, agents and employees of the company are made guilty of a misdemeanor, and upon conviction, each may be punished by imprisonment in the County Jail for a period not exceeding 90 days. Each violation would be a separate offense and further might result in imprisonment of the various agents of the company who would dare disobey, for a term of 90 days each for each offense.
>
> Disobedience to the Passenger Rate Act, renders the party guilty of a felony and subject to a fine not exceeding five thousand dollars or imprisonment in the state prison for a period not exceeding five years or both fine and imprisonment. The sale of each ticket above the price permitted by the Act, would be a violation thereof. It would be difficult; if not impossible, for the company to obtain officers, agents or employes willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission.
>
> The company, in order to test the validity of the Acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation, must be to preclude a resort to the courts, either state or federal, for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the Acts or orders at the risk of such fines and penalties being imposed upon them in case the Court should decide that the law was valid.

> The result would be a denial of any hearing to the company.
>
> * * * * * * *
>
> It may be further stated that when the penalties for disobedience are by fine so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms, prohibited the company from seeking judicial construction of laws which deeply affect its rights."

There appears to be very little difference, if any at all, between the case of *Adams* v. *Tanner* (*supra*) and the case at bar. In the cited case, this Court held that the right to conduct an employment agency is a property right and injunction a proper remedy to prevent the destruction of such business by an unconstitutional statute. The right to engage in the motor vehicle business is a right of property and the stabilizing limitations of the Fourteenth Amendment safeguard its annihilation by unconstitutional statutes.

Similarly, therefore, in this case, injunction is the proper remedy.

Analysis of Attorney General's Argument.

In the brief submitted by the Attorney General, on the question of jurisdiction it is asserted under "Point I" that a Court of Equity has no jurisdiction to enjoin a "pending prosecution". With this general statement of law appellant takes no issue. The facts in the case at bar however, present a case where no prosecution was pending, but threats and proclamations of the intent to criminally prosecute the appellant by reason of alleged violations of the State statute and the imminency of such criminal prosecutions.

While the Attorney General asserts in "Point I" of his memorandum that the statutory Court "should not have assumed jurisdiction to enjoin the pending prosecution", he nevertheless admits on page 10 of his brief that *"no prosecution had been commenced"*. It is therefore apparent that in the case at bar, equity jurisdiction was not invoked to restrain a "pending prosecution", but threatened criminal prosecutions. This is borne out not only by the allegations of the Bill of Complaint (R. 11 and 12, paragraph 23 of Bill of Complaint), but also by the Finding of Fact of the statutory Court (R. Supp. 15, Finding of Fact "10th").

The statement on page 10 of the Attorney General's brief that "there was no threat to continue prosecutions" is not supported in the record or in the Findings of Fact herein.

The Attorney General asserts further at page 4 of his brief that a single prosecution could determine the validity of the state statute attacked and in that fashion, permit the state's highest court to determine the issues upon such prosecution. This argument is not new. It was asserted by the Attorney General in the case of *Ex parte Young* (*supra*). The answer to that proposition was succinctly stated by this Court in the case mentioned, as follows:

> "It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity therefore has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the Act is to disobey it at least once after which the company might obey the Act pending subsequent proceedings to test its validity. But in the event of a single violation, the prosecutor might not avail himself of the opportunity to make the test as obedience to the law was thereafter continued and he might think it unnecessary to start an inquiry. If however, he should do so while the company was thereafter

> obeying the law, several years might elapse before there was a final determination of the question and if it could be determined that the law was invalid, the property of the company would have been taken during that time without due process of law and there would be no possibility of its recovery."

While admitting that the state statute is attacked upon the ground that it violates the Fifth and Fourteenth Amendments to the Constitution, the Attorney General asserts on Page 6 of his memorandum, that such attack is secondary and is only incidental to the attack made upon the statute under the State Constitution. He urges further that the appellant should be compelled to resort to the state courts to determine the constitutionality of the statute.

The answer to that argument is contained in the language of this Court in *Terrace* v. *Thompson* (*supra*) wherein the following appears:

> "They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complainant presents a case in which equitable relief may be had if the law complained of is shown to be in contravention of the Federal Constitution."

It has been held by this Court that where a federal constitutional question is raised, the Federal Court has jurisdiction and is authorized to determine all the questions in the case, local as well as Federal, and that in the exercise of such power is competent to determine the constitutionality of the statute assailed as being repugnant to the state Constitution as well as the Federal Constitution.

Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298;
Chicago & Great Western R. R. Co. v. *Kendall*,
45 Sup. Ct. Reporter 55 (Nov. 12th, 1924).

In *Louisville & N. R. Co.* v. *Garret* (*supra*) this Court stated:

> "Because of the Federal questions raised by the bill, the circuit court had jurisdiction and was authorized to determine all the questions in the case, local as well as federal. *Siler* v. *Louisville & N. R. Co.* 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges and authorizes an appeal to this court. 36 Stat. at L. 557, Chap. 390. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds, and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case, and would properly be the subject of consideration in determining the propriety of granting an injunction pending suit. *The local questions arising under the state constitution and statutes were therefore before the circuit court and the bill brings them here. They may be first considered.*". (Italics ours.)

The most practical and most adequate method to determine the most serious constitutional questions of this age, was resorted to in this case in order that a final and decisive determination be secured as expeditiously as

possible. When graye constitutional questions of state statutes are involved, Section 266 of the Judicial Code (U. S. Code, Title 28, Section 380) is by far the most efficient and direct avenue for their determination.

The Attorney General cites at page 9 of his memorandum the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445. In that case, while this Court declined to enjoin a *pending* prosecution, it nevertheless enjoined threatened prosecutions not then pending, and is authority for the contentions urged by the appellant herein.

The Bill of Complaint in the *Cline* case alleged amongst other things, that the individual plaintiffs, experienced dairymen, by painstaking effort, fair dealing and careful management, have gained thousands of customers and a well established trade, and that their companies, in addition to their tangible property and assets, have good wills of great value. It was therein charged that the Act, the enforcement of which was sought to be restrained was unconstitutional in that it deprived the dairymen of their property rights.

Equity jurisdiction was sustained and an injunction granted to restrain threatened prosecutions under the exception to the general rule, the statute being declared unconstitutional, while pending criminal prosecutions could not, under the general rule, be enjoined.

When we compare the allegations of the Bill of Complaint in the case at bar with the facts in the *Cline* case, we find parallel allegations, to wit, that the complainant in the case at bar "has expended vast and considerable sums of money, time and effort and has developed a good will amongst its customers and patrons of immeasurable value" (R. 5; R. Supp. 38, Finding 92nd).

Were the complainant to defy the criminal authorities and continually violate the provisions of Article IV of

the Code of Fair Competition for the Motor Vehicle Retailing Code, it would subject itself to the severe penalties provided by the statute. On the other hand, should it comply with the statute under the compulsion of the purported validity of the Act, then it would be deprived of its property rights under its claim that the state statute arbitrarily, unreasonably and oppressively interferes with the lawful conduct of its business and deprives it of its rights to consummate its sales at such prices as its discretion dictates, based upon sound business policy.

In the latter instance appellant asserts it will be compelled to submit to the statute even if invalid, unless this suit be entertained and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law in contravention of the 14th Amendment to the Federal Constitution.

The appellant cannot, in the face of the invalidity of the statute, comply therewith, and see its business destroyed, nor fail to comply and see itself fined out of business unless a court of equity entertained its suit for the determination of the validity and constitutionality of the statute involved.

Ex parte Young, supra.

For the foregoing reasons, it is respectfully urged that the appellant properly resorted to a Court of equity, and that the statutory Court did not err in sustaining equitable jurisdiction.

POINT II.

The appellee is an officer of the State within the purview of Section 266 of the Judicial Code (United States Code, Title 28, Section 380).

The appellee's brief herein has painstakingly and adequately discussed the position of the appellee District Attorney as a state officer within the purview of Section 266 of the Judicial Code, and has amply demonstrated by historical reference as well as by the decisions of the Courts of the State of New York, his position as an officer of the state. We need not, therefore, unduly lengthen this memorandum with the repetition of the arguments asserted in the appellee's brief.

Diligent research on this legal question has failed to unearth any precedents which are clearly decisive of the issue. This Court has not had occasion to pass upon this problem in any of the cases before it. In at least two reported cases, however, this Court entertained suits against a County Attorney and a County Prosecuting Attorney under Section 266 of the Judicial Code and determined them on the merits (*Noble* v. *Douglas*, 261 U. S. 165 (a County Prosecuting Attorney); *Gulf Fisheries Co.* v. *McInerney*, 276 U. S. 124 (County Attorney)).

The question as to whether or not the respective County Prosecuting Attorney and County Attorney were state officers within the purview of Section 266 of the Judicial Code, was not expressly raised in the cases cited.

In addition to the case of *Fellows* v. *Mayer*, 8 Hun 484, cited to this Court on the argument of the appeal herein, and referred to in the appellee's supplemental Brief, we

may cite three additional cases arising in other jurisdictions wherein the question was precisely raised and passed upon.

State v. *Romero,* 125 Pacific (N. Mex.) 617;
Griffin v. *Rhoton,* 85 Ark. 89, 107 S. W. 380;
Spear v. *Wood,* 128 Ark. 123, 193 S. W. 785.

The case of *State* v. *Romero* (*supra*) was a mandamus action commenced by one, Ward, a District Attorney, against Romero the County Treasurer of San Miguel County, to compel the County Treasurer to pay him a certain fee for services rendered to the County, the District Attorney having first procured the allowance by the Board of County Commissioners of San Miguel County. Ward was the District Attorney of the Fourth Judicial District in New Mexico, the state being divided into judicial districts. The lower Court found for the relator District Attorney. The question for determination before the Appellate Court was whether or not the District Attorney was a County officer so that he could be compensated by the county or whether or not he was a state officer. The Appellate Court reversed the peremptory writ granted to the District Attorney and held that the District Attorney Ward, was not a County officer, but a state officer, within the purview of the New Mexico Constitution. The Court said in part:

> "He was made the law officer of the territory and the fact that he may have performed his duty in prosecuting and defending suits within defined limits, did not make him any less the representative of the territory. He was an agent provided for by the Legislature and appointed by the Governor to perform the high function of the state in the preservation of the public peace and the protection of life and property; he prosecuted in the name of the people of the territory, not of any county or district;

> he was the advocate of all the people of the territory and did not represent it in the enforcement of law and did not represent one county or one district. He was not required to reside at the time of appointment within the district for which he was appointed. While it was true he was the law officer of the various counties within his district, yet his duty was but an incident of the office, or the employment of a state agent for a purely local purpose, and did not change the nature of his office."

The Supreme Court of Arkansas in the case of *Griffin* v. *Rhoton* (*supra*), in considering the question as to whether or not the District Attorney was a state officer within the meaning of a constitutional provision which provided that no officer of the State should receive for salary fees amounting to more than $5,000 net profit per annum, said:

> "This court is of the opinion that the constitutional provision applies to the office of Prosecuting Attorney. It is a state office within the meaning of this provision. A prosecuting attorney is, according to the requirements of the Constitution, elected by the qualified electors of the Circuit for which he is to serve and must be a resident of that Circuit. Nevertheless, he is elected as an officer of the state. He draws a salary from the state as one of its officers, which is provided for in a section of the Constitution grouping together the other state officers, and he is the representative of the state in all criminal prosecutions in his Circuit. It is true that he is by statute made the representative of each county in his Circuit in all litigation in which the counties are concerned. Some of the emoluments of his office come from the counties; the statute providing in certain contingencies that the counties shall pay the cost of criminal prosecution. Still he is an officer of

the state and represents the several counties in his district only as political subdivisions of the state."

* * * * * * *

"From what we have said, it follows that the District Attorney under the Constitution is a state officer; * * *"

In *Spear* v. *Wood* (*supra*), the Prosecuting Attorney Spear was indicted for criminal misconduct. The Circuit Court sought to suspend him from office during the pendency of the indictment. Spear then sought a writ of prohibition against the Circuit Court from entering an order suspending him from office during the pendency of the indictment. He alleged that he was a state officer and that the Circuit Court was vested with power only to remove a County or Township officer, and as such state officer, he was therefore not subject to the Circuit Court jurisdiction. The Arkansas Constitution provided for the removal of state officers by impeachment before its Senate with proceedings being initiated in its House of Representatives or by the Governor upon the joint address of two-thirds of the members elected to each house of the General Assembly.

The Court on appeal held that Spear, the Prosecuting Attorney, while a local officer, was nevertheless a state officer, and that therefore, the Circuit Court, although vested with power to remove county or township officers, had no jurisdiction to remove the Prosecuting Attorney in view of his position as a state officer.

The appellee in the case at bar while performing his duty in prosecuting criminally within defined territorial limits, nevertheless in such cases, is acting as agent of the state and as such, is a state officer rather than a local officer.

Prosecutions in New York County as well as any other counties of the State of New York, are brought in the

name of the People of the State of New York at large and not in the name of the people of a particular county or locality. The District Attorney is the agent and officer of the People of the State, and not of the people of a particular county, and the fact that he performs his duty in prosecuting within defined limits, does not make him any less the representative of the People of the State of New York at large. His duties do not require him to enforce merely local laws, but to enforce the laws of the State.

The Attorney General of the State of New York is duty bound under Section 62 of the Executive Law of the State of New York to "prosecute and defend all actions and proceedings in which the state is interested". He is the State's attorney for the purpose of prosecuting actions wherein the People of the State of New York is the complainant or plaintiff as the case may be, and the representative of the State in any action wherein the State is a defendant.

It has been repeatedly held that actions brought under Section 266 of the Judicial Code to restrain the enforcement of unconstitutional state statutes, are not actions against the state as such (*Ex Parte Young* (*supra*) and cases therein cited and discussed).

In the light of these decisions, the State of New York is not a party defendant in this suit, and therefore, the Attorney General would not be a proper party to this action. Furthermore, the Attorney General of the State of New York is not authorized to prosecute offenses generally and has no jurisdiction under Chapter 781 of the Laws of 1933, the statute herein questioned. This is readily admitted by the Attorney General in his memorandum (p. 8, Attorney General's Memorandum on Jurisdiction).

This being so, the only being specially charged with the duty to enforce the statute, is the defendant-appellee, the District Attorney of New York County.

In making an officer of the state a party defendant in a suit to enjoin the enforcement of an Act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the Act or else it is merely making him a party as a representative of the state and thereby attempting to make the state a party in violation of the Eleventh Amendment to the Federal Constitution.

If it is determined that the District Attorney of New York County is not an officer of the state within the purview of Section 266 of the Judicial Code, we can find no state officer as such, against whom such an action may be instituted in the State of New York to restrain the enforcement of this unconstitutional statute.

The suggestion by the Attorney General that the proper party defendant in this case would be the Secretary of the State of New York, is groundless, for under Chapter 781 of the Laws of 1933, his function is merely ministerial, *i. e.*, to accept for filing Codes of Fair Competition approved by the President of the United States. He is not invested with any duty or discretion under Chapter 781 of the Laws of 1933, or, under the State Constitution, with the power of enforcement of the provisions of this Act, or of any other criminal statute. The officer proceeded against "must have some connection *with the enforcement of the Act*" (*Ex parte Young, supra*). Obviously, the Secretary of State of New York is not such proper party.

If it is to be held that the District Attorney is not a state officer within the purview of Section 266 of the Judicial Code, then he was likewise not a proper party to be enjoined in the cases of *Tyson* v. *Banton* (*supra*), *Packard* v. *Banton* (*supra*) and *Hygrade Provisions Co.* v. *Sherman* (*supra*). The relief granted in *Tyson* v. *Banton* was against both the Attorney General *and* the District Attorney of New York County. If it is to be held, therefore, as asserted by the Attorney General in the case at

bar, that the District Attorney is not a state officer within the purview of Section 266 of the Judicial Code, then he impliedly asserts that this Court erred in granting an injunction in the *Tyson* case, and also erred in *Packard* v. *Banton* and *Hygrade Provisions Co.* v. *Sherman*, in the entertainment of the suits on the merits against state officers.

If the District Attorney of New York County were stricken as a party defendant in *Tyson* v. *Banton* (*supra*), relief against the Attorney General alone would never have sufficed to prevent criminal prosecution in the absence of any duty on the part of the Attorney General to prosecute for the commission of misdemeanors defined by the statute therein. The District Attorney would therefore be free to proceed to criminally prosecute the appellant Tyson.

To remand this case to the District Court and allow a single District Judge to determine the constitutionality of the state statute involved, would be to defeat the intents and purposes of Congress in the enactment of Section 266 of the Judicial Code, which requires a statutory Court of three judges to decide such paramount questions. (*Suncrest Lumber Co.* v. *N. Carolina Pack. Comm.*, 29 Fed. (2nd) 823.)

A liberal construction of Section 266 of the Judicial Code, bearing in mind the purpose and intent of Congress in its enactment, sustains the conclusion of the appellant that the appellee, the District Attorney of New York County, is an officer of the state within its purview, and as such, is a proper party defendant.

The requirements of Section 266 of the Judicial Code (United States Code, Title 28, Section 380), were duly complied with in the manner therein provided. Copies of the Bill of Complaint and Notice of application for a temporary injunction were duly served upon the Governor of

the State of New York and the Attorney General. The Attorney General appeared before the Statutory Court, his appearance was noted (R. 264), and participated in the argument as well as in the filing of briefs.

The Attorney General also entered into the stipulation with respect to the making of Findings of Fact and Conclusions of Law (R. Supp. 4), he participated in all the proceedings in this case and appeared in this action on the argument before this Court. He appeared by virtue of the salutory provisions of Section 266 of the Judicial Code when notice was served upon him and not as claimed "in accordance with the policy and established practice of the Attorney General's office in cases where the constitutional validity of state statutes is attacked" (Attorney General's Brief, p. 12).

This case does not present a situation where a state is given no opportunity to be heard on the merits and to support if possible the constitutionality of the state statute involved. On the contrary, the Attorney General has taken part in every hearing, including the one before this Court.

The Attorney General has now moved before this Court to dismiss the appeal herein on the ground of want of jurisdiction.

The appellant respectfully submits that the Attorney General assumes a most anomalous position. If he does not consider himself a party to this case, although not of record, no authority exists for him to move before this Court to dismiss the present appeal for want of jurisdiction. While appellant cannot doubt the right and duty of this Court to interpose the jurisdictional objection *sua sponte*, such motions however are only available to parties of record.

CONCLUSION.

Appellant respectfully submits by reason of the foregoing, that equitable jurisdiction was properly invoked to restrain the appellee as a state officer within the purview of Section 266 of the Judicial Code, and respectfully prays for a determination of the paramount issues presented by this case on the merits.

Respectfully submitted,

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MELVIN L. LEVITT,
On the Brief.

New York, N. Y., April 4th, 1935.